Criminal Action

Monmouth Informa[illegible]n #548-80
U.S.S.Ct. #

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JUL 16 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The United States Supreme Court
October Term, 1981

THE STATE OF NEW JERSEY,

Appellee/Respondent,

-vs-

DAVID BOVE a/k/a Edward Rosenberg,

Appellant/Petitioner.

APPEAL FROM THE NEW JERSEY SUPREME COURT

FOR APPELLEE/RESPONDENT: Attorney General of New Jersey, Office of the Attorney General, Hughes Justice Complex, Trenton, New Jersey 08625.

FOR APPELLANT/PETITIONER: David Bove a/k/a Edward Rosenberg, pro se, #65985, New Jersey State Prison, Lock Bag R, Rahway, N.J. 07065.

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OPINIONS BELOW

The unpublished opinion of the Superior Court of New Jersey, Appellate Division, issued on February 23rd, 1982, opining that petitioner's assertion to a right to jury trial is "clearly without merit," is attached at Pa48 to Pa50, at Pa50.[1/]

The published, but summary order of the New Jersey Supreme Court, issued on May 26th, 1982, dismissing the appeal and denying the petition for certification, is at Pa53.

JURISDICTIONAL STATEMENT

This is an appeal from a final judgment in the State's highest court, denying petitioner's direct appeal from criminal conviction and sentence; and hence, this Court's jurisdiction is invoked under 28 USC 1257(2). As shown by the "Question Presented," infra at p. 2, this case involves a State's substantial deviation from recognized constitutional mandates.

-Cont'd-

[1/] The State's Appellate Division noted only that they were adjudicating petitioner's "pro se supplemental letter brief." The arguments presented to the State's Appellate Division are at Pa30 to Pa47, and the arguments presented to the State's Supreme Court are at Pa51 and Pa52.

QUESTION PRESENTED

Whether those facing a five or more years enhanced penalty are entitled to a jury trial of the distinct prerequisite elements listed in the governing statute,[2/] pursuant to the federal Sixth and Fourteenth Amendments (right to jury trial and due process clause, respectively)?

CHALLENGED STATE LAW

NJS 2C:44-6. Procedure on Sentence

"(e) The court shall not impose a sentence of imprisonment for an extended term unless the ground therefor has been established at a hearing after the conviction of the defendant and on written notice to him of the ground proposed. The defendant shall have the right to hear and controvert the evidence against him and to offer evidence upon the issue."

-Cont'd-

2/ The statutory prerequisite elements for extended term sentencing are:

(a) Persistent Offender. "A persistent offender is a person who at the time of the commission of the crime is 21 years of age or older, who has been previously convicted on at least two seperate occasions of two crimes, committed at different times, when he was at least 18 years of age ...". (NJS 2C:44-3a)

(b) Professional Criminal. "A professional criminal is a person who committed a crime as a part of a continuing criminal activity in concert with two or more persons, and the circumstances of the crime show he has knowingly devoted himself to criminal activity as a major source of livelihood." (NJS 2C:44-3b)

(c) Paid Criminal. A paid criminal is a person who committed a crime for pecuniary gain, other than the direct proceeds of the crime; e.g., crime for hire. (NJS 2C:44-3c)

STATEMENT OF THE CASE

By information filed with the Monmouth County Clerk on December 24th, 1980, petitioner was accused of stealing over $500, in violation of NJS 2C:20-3,[3/] and of being in possession of a knife, in violation of NJS 2C:39-5(d)[4/] (the information is attached at pages Pa1 and Pa2). On December 24th, 1980, petitioner pled guilty to both of the charges (Pa3 to Pa13);[5/] and on February 27th, 1981 petitioner was consequently sentenced to an extended term of 10 years, with a 5-year term of parole ineligibility (Pa14 and Pa15). Imposition of the extended term enhanced petitioner's sentence by 5 years and 2-1/2 years of parole ineligibility (cf. NJS 2C:43-6a3 and b, with 2C:43-7a4 and b). In accordance with governing State law, that is, NJS 2C:44-6(e), the extended term was imposed summarily and without anyone ever advising petitioner of his procedural rights under the U.S. Constitution; that is, petitioner was never advised of his right against self-incrimination, of his right to have the State bear the burden of proof beyond a reasonable doubt, of his right to confrontation and cross-examination, or of his right to jury trial on the prerequisite criterions[6/] (Pa16 to

-Cont'd-

3/ NJS 2C:20-3(b)(2)(a) designates a theft of over $500 to be a third degree crime, and 2C:43-6(a)(3) and (b) sets the ordinary maximum at 5 years with 2-1/2 years of parole ineligibility.

4/ NJS 2C:39-5(d) designates possession of a knife to be a fourth degree crime, and 2C:43-6(a)(4) sets the ordinary maximum at 18 months.

5/ Although there was a plea agreement, the plea agreement is not delineated because it is immaterial to the issue subject of this appeal.

6/ The statutorily mandated criterions are set forth in footnote 2, infra.

STATEMENT OF THE CASE (Cont'd)

Pa29). Had petitioner been advised of his procedural rights, and of the consequences of waiving those rights, that is, advised of the judge's intention to impose the maximum extended term, petitioner would have availed himself of those rights.

On direct appeal to the State's Appellate Division, petitioner asserted Sixth and Fourteenth Amendment rights to jury trial on the issue of enhancement as a persistent offender (Pa30 to Pa47), arguing that all of the traditional reasons for jury trial apply, and especially that rationale concerned with safeguarding against corrupt application of law (Pa40). On February 23rd, 1982 the Appellate Division rejected petitioner's pro se arguments (Pa48 to Pa50, at Pa50).

On appeal to the Supreme Court of New Jersey, petitioner re-asserted his Appellate Division arguments (Pa51 and Pa52). On May 26th, 1982 the State Supreme Court denied and dismissed that appeal (Pa53).

Petitioner gave timely notice of appeal (Pa54); and hence the matter now at bar.

REASON WHY THIS APPEAL SHOULD BE HEARD

The subject matter of this appeal will affect the interests of a huge class of citizens and have an overflowing affect on many subclasses; but more important, the right to jury trial has seriously eroded in New Jersey and will undoubtedly soon be extinct. For example, the right to jury trial in civil commitments no longer exists (NJS 30:4-42), disorderly persons' defendants no longer have a right to jury trial in cases where the exposure is 6 months' imprisonment and a $10,000 fine,[7/] and the State's highest court, despite noting the importance of the question, expressly ignored a question identical to that now at bar (State v. Maguire, N. J. Supreme 1980, 84 N. J. 508, at footnote 10).

-Cont'd-

7/ Petitioner's writ-writer is unable to relocated the relevant case. The case was approved for publication in April or May of 1982, and concerned the Law Division's interpretation of NJS 2C:37-2(b)(2), last sentence, allowing imposition of a $10,000 fine on a disorderly persons' gambling offense.

LEGAL ARGUMENT

THE SIXTH AND FOURTEENTH AMENDMENTS REQUIRE JURY TRIAL IN ENHANCED SENTENCING PROCEEDINGS.

The 'right to jury trial' clause of the Sixth and the due process clause of the Fourteenth Amendments require the State to afford the accused jury trial when the potential loss exceeds 6 months of imprisonment. Duncan Trilogy, 1968, 88 S.Ct. 1444 thru 1488; Baldwin v. New York, 1970, 90 S.Ct. 1886; Williams v. Florida, 1970, 90 S.Ct. 1893; Ballew v. Georgia, 1978, 98 S.Ct. 1029; and Burch v. Louisiana, 1979, 99 S.Ct. 1623. The '6 month' limit is not necessarily a hard and fast rule; for example, once duly convicted, the due process clause does not require the availability of jury trial in determining what sentence—within the ordinary guidelines—is imposed, notwithstanding that the maximum exceeds the minimum by more than 6 months (Williams v. New York, 1949, 69 S.Ct. 1079); and the "full panoply of due process protections" comes into play only when the State law limits the discretion of the sentencing judge, e.g., if a more-than-6-months enhancement cannot be levied absent the existence of statutorily-mandated prerequisite elements, the due process clause requires that the accused be afforded the opportunity of jury trial on the "distinct issue" of whether those elements have been proved to exist. Estelle v. Smith, 1981, 101 S.Ct. 1866 (distinguishing a Williams sentence from an enhanced sentence); Spech v. Patterson, 1967, 87 S.Ct. 1209 (distinguishing a Williams

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sentence from an enhanced sentence); and U.S. ex rel. Gerchman v. Maroney, CA3 1967, 355 F.2d 302.

It is noted that some federal courts have ruled against a due process right to jury trial. The sole adverse case which is directly on point is U.S. v. Bowdach, CA5 1977, 561 F.2d 1160; a rather unusual case inasmuch as the constitutionally based challenge to the deprivation of jury trial in enhanced sentencing was never recognized or addressed by the district court (S.D. Florida 1976, 414 F.Supp. 1346), apparently was not taken to the U.S. Supreme Court, and Bowdach suffered no increased penalty, or no significantly increased penalty, as the result of conviction as a "dangerous special offender." In reaching their conclusion, CA5 attempted to reconcile Specht with Williams, and interestingly, gave more weight to the 1949 Williams' holding dealing with ordinary sentencing (albeit a death sentence), over the 1967 Specht holding dealing with enhanced sentencing and adopting the Third Circuit's rationale in U.S. ex rel. Gerchman, to the effect that the full panoply of due process protections apply in extended term sentencing (Specht at 1212, Gerchman at 312). The Bowdach court evidently ignored the Specht Court's reliance on Graham v. State of West Virginia, 1912, 32 S.Ct. 583, inasmuch as the "prior conviction of another offense ... is a distinct issue" (Graham at 586, Specht

-Cont'd-

at 1212). The Bowdach court also reasoned that jury trial was not required because "the accused's only defenses are that he is not the person mentioned in the previous convictions or that the convictions are void" (Bowdach, at 1175); but this rationale is faulty because any accused's only defenses are that he is not the person who committed the crime or that no crime has been committed, and it is no accused's burden to prove innocence (Sandstrom v. Montana, 1979, 99 S.Ct. 2450; and Jackson v. Virginia, 1979, 99 S.Ct. 2781), leastwise those minute number of offenders who are prosecuted as 'repeat offenders'[8/] (Estelle, Specht, Gerchman). Accordingly, Bowdach would not seem to be controlling.

Another case which is somewhat on point is Hollis v. Smith, CA2 1978, 571 F.2d 685, at 692-3, holding against a due process right to jury trial in sexual psychopath civil commitments which enhance the duration of the term authorized by criminal law. As the lone dissenter in Estelle v. Smith relied upon Hollis (Estelle at 1879), it can fairly be said that Hollis was and was meant to be overturned by implication. Thus, Hollis does not seem to be controlling here.

There is also a line of cases which, without rationale, holds against a due process right to jury trial in ordinary civil commitments. Lynch v. Bexley, 3J M.D.Ala. 1974, 386 F.Supp. 378, at headnote 39 (but

-Cont'd-

8/ State v. Kozarski, N.J.Law Div. 1974, 128 N.J.Super. 513, at 520 n. 5 (out of 72,000 criminal cases, repeat offender sentencing was invoked only once).

Alabama statute requires jury trial, at hns. 41 & 42); Doremus v. Farrell, 3J D.Neb. 1975, 407 F.Supp. 509, at headnote 11 (unable to discern whether Nebraska law provides right to jury trial; cf. Vitek v. Jones, 1980, 100 S.Ct. 1254, at footnote 2); French v. Blackburn, 3J M.D.N.C. 1977, 428 F. Supp. 1351, at headnote 20 (North Carolina law does not provide right to jury trial, at hns. 19 & 20); and Dorsey v. Solomon, D.Md. 1977, 435 F. Supp. 725, at headnote 7 (Maryland law provides right to jury trial, at pp. 733-4), aff'd on other grounds, CA4 1979, 604 F.2d 271. Because the foregoing line of cases do not set forth those courts' reasoning, petitioner is unable to discern whether that reasoning is sound, and if sound, whether that reasoning would apply in the instant case; and consequently, petitioner must baldly assert that those courts' reasoning is tenuous and inapplicable to the instant case.

Also adverse to petitioner's bid for jury trial is the principle that the due process clause requires only that process required by State law. Greenholtz v. Inmates, 1979, 99 S.Ct. 2100 (divided Court). The invalidity of that principle as a 'blanket law' is made readily apparent by the Court's unanimous decision in Ballew, holding the Sixth and Fourteenth Amendments to require Georgia to afford more than 5-member jury panels in criminal trials, as well as the holdings in Duncan, Burch, etc.

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LEGAL ARGUMENT (Cont'd)

The instant case warrants jury trial under the working rationale for jury trials. "The purpose of trial by jury, as noted in Duncan, is to prevent government oppression by providing a 'safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.' " Burch, supra at 1626, citing Duncan, supra at 1451. This 'working rationale' would logically be equally applicable in protecting against the corruption known as selective enforcement. For example, if all robbers are prosecuted, the State attorney's decision to prosecute a robber would be above question, and any decision to the contrary would have to be supported by rational reasons such as insufficient evidence or tattletale immunity. As most repeat offenders are not prosecuted under the New Jersey repeat offender law,[9/] the State attorney's decision to prosecute a repeat offender must rest on some apparent rational reason;[10/] and in lieu of such rationale, either apparent on the record or submitted in collateral proceedings, the decision to prosecute is prima facie corrupt. In the instant case, peti-

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9/ See footnote #8, infra.

10/ A State's discrimination must rest on some compelling necessity or be rationally related to some legitimate State interest. McGinnis v. Royster, 1973, 93 S.Ct. 1055; Chicago Police Dept. v. Mosley, 1972, 92 S.Ct. 2286; Baxstrom v. Herold, 1966, 86 S.Ct. 760; and Humphrey v. Cady, 1972, 92 S.Ct. 1048. The 'compelling necessity test' should be applied in this petitioner's case because the right to jury trial is fundamental (cf. Declaration of Independence; U.S. Const., Art. III, Cl. 3, and Amendment VI; and N.J. Const. of 1776, Art. XXII); and New Jersey recognized the right as fundamental for more than a hundred years prior to the enactment of NJS 2C:44-6(e), by statutorily providing for jury trials in repeat offender schemes (NJS 2A:85-13).

tioner's theft is not so egregious as to distinguish him from others who have prior convictions and are not prosecuted as repeat offenders; petitioner's theft was attempted by his reaching over a counter into an open cash register, grabbing the money, and running until two customers jumped on him and held him on the floor (Pa6-3 to 11).[11/] Given the constitutionally quasi-suspect selective prosecution, the unconstitutionally informal enhancement proceedings,[12/] and the esteem of the right to jury trial, the State ought to be encumbered by jury trials in order to somewhat insure against irrationally arbitrary selective prosecutions; but in any event, this petitioner's right to jury trial was violated.

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11/ While petitioner possessed a pocket knife during the commission of the theft, petitioner did not exhibit the knife or otherwise threaten the use of it, not even when 'jumped' by the two customers. Pa6.

12/ By not giving petitioner a chance to plea to the accusation that he was a repeat or persistent offender, the judge was under no obligation to advise petitioner of his procedural rights; and exploiting petitioner's ignorance, the State attorney made no effort to meet those procedural rights inasmuch as the 'persistent offender' adjudication rests entirely on inadmissible hearsay. The enhancement proceeding, by being disguised as a 'motion,' circumvents the process required in pleas and violates all of the constitutional rights underlying this Court's reasoning in Santobello v. New York, 1971, 92 S.Ct. 495.

CONCLUSION

Wherefore, this Court is asked to hold that petitioner has a right under the Sixth and Fourteenth Amendments to jury trial prior to imposition of an enhanced, 'persistent offender' sentence; to declare unconstitutional those aspects of NJS 2C:44-6(e) which abrogate petitioner's right to jury trial; and to remand this case back to the Superior Court of New Jersey, Law Division, Monmouth County, with instructions to vacate the 'extended' portion of petitioner's sentence, until such time when petitioner has been duly convicted by a jury of being a 'persistent offender.'

ATTESTATION TO SERVICE

Under penalty of perjury, I certify that on this day, by mailing Fir Class postage prepaid via the U.S. Mail, I served one copy of this instrument upon the Attorney General of New Jersey. 28 USC 1746.

DATED: July 14th, 1982

David Bové

DAVID BOVE
a/k/a Edward Rosenberg
Appellant/Petitioner

Monmo[illegible] County Information #548-8

David Bove (Aplt-ptr. pro se)
#65958, N. J. State Prison
Lock Bag R
Rahway, New Jersey 07065

RECEIVED
JUL 16 1982
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SUPREME COURT, U.S.

82 5054

In The United States Supreme Court
October Term, 1981

THE STATE OF NEW JERSEY,
Appellee/Respondent,
vs.
DAVID BOVE a/k/a Edward Rosenberg,
Appellant/Petitioner.

Docket #

Criminal Action

NOTICE OF MOTION FOR INDIGENCY LEAVE

TO: CLERK OF THE COURT
Attorney General of New Jersey (Esquire for Appellee)

PLEASE TAKE NOTICE that as soon as the Court Clerk deems it practicable to put this matter before the Court, appellant/petitioner will hereby move this Court pursuant to 28 U.S.C. 1915(a), for leave to proceed in forma pauperis on appeal taken as by right pursuant to 28 U.S.C. 1257(2).

DATED: July 14th, 1982

David Bové

DAVID BOVE
a/k/a Edward Rosenberg
Appellant/Petitioner

AFFIDAVIT FOR INDIGENCY LEAVE

I, DAVID BOVE, being duly sworn, depose and say that I am the appellant/petitioner in the fore-attached notice; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; and that I believe I am entitled to redress. I further swear that:

1) Other than under $ 10 that I presently have on my account at the State Prison where I am confined, I have no money or accounts.

2) In the last twelve months I have received under $ 5 compensation for prison work, and under $ 400 given in small amounts at sporadic intervals by friends and/or family, otherwise I have received no money from any source whatsoever.

3) I own no real property or valuables and if all of my personal belongings were liquidated, I would not have $ 200 clear estate.

4) The issues which I desire to present to this Court are the following:

Whether those facing a five or more years enhanced penalty are entitled to a jury trial (as apposed to a hearing) of the distinct prerequisite elements listed in the governing State statute (either two prior convictions, or professional or paid gangster status), pursuant to the federal Sixth and Fourteenth Amendments (jury trial and due process clauses, respectively)?

-Cont'd-

AFFIDAVIT FOR INDIGENCY LEAVE (Cont'd)

Service. On this day, by mailing First Class postage prepaid via the U.S. Mail, I served one copy of this instrument upon each: Attorney General of New Jersey (Esquire for Appellee/Respondent).

Certification. Under penalty of perjury, I certify that all of the foregoing statements are truthful and accurate. 28 USC 1746.

DATED: July 14th, 1982

David Bové

DAVID BOVE
a/k/a Edward Rosenberg
Appellant/Petitioner

* * *

VERIFICATION OF PRISON FUNDS

I hereby certify that the appellant herein, DAVID BOVE (SP# 65958), has the sum of $0.12 on account to his credit at the New Jersey State Prison, at Rahway, where he is confined; and I further certify that said institution's records infer that he has the following securities to his credit: None.

DATED: July 14th, 1982

Richard P. Cicone
Institutional Socialworker

David Bove (Aplt-ptr. pro se)
#65985, N.J. State Prison
Lock Bag R
Rahway, New Jersey 07065

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RECEIVED
JUL 16 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The United States Supreme Court
October Term, 1981

THE STATE OF NEW JERSEY,
Appellee/Respondent,
vs.
DAVID BOVE a/k/a Edward Rosenberg,
Appellant/Petitioner.

DOCKET NO. _____

CRIMINAL ACTION

NOTICE OF APPEAL

TO: Clerk of the U.S. Supreme Court
Attorney General of New Jersey
Esquire for Appellee/Respondent
Supreme Court of New Jersey

PLEASE TAKE NOTICE that the Appellant/Petitioner, David Bove, who is presently confined serving an enhanced sentence of 5 to 10 years for theft, will appeal from the final judgment of the New Jersey Supreme Court, decided on May 26th, 1982, under case number 19,684 (or C-655). This appeal is launched pursuant to 28 USC 1257(2).

David Bové

DAVID BOVE
a/k/a Edward Rosenberg
Appellant/Petitioner

DATED: July 14th, 1982

SERVICE

I, DAVID BOVE, being first duly sworn according to law, upon my oath do depose and say that:

ON THIS DAY, via First Class postage prepaid U.S. Mail, I served upon each of the following parties a copy of the appended NOTICE OF APPEAL:

The Supreme Court of New Jersey (the court below); and,

The Attorney General of New Jersey (Esquire for Appellee/Respondent).

I CERTIFY THAT the above statements made by me are true; I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment. N.J.Ct.R. 1:4-4(b), and 28 U.S.C. §1746.

DATED: July 14th, 1982

David Bové

DAVID BOVE
a/k/a Edward Rosenberg
Appellant/Petitioner

FILED
MONMOUTH COUNTY
DEC 24 1980
County Clerk

ALEXANDER D. LEHRER
MONMOUTH COUNTY PROSECUTOR
COURT HOUSE
FREEHOLD, NEW JERSEY 07728

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION (CRIMINAL)
MONMOUTH COUNTY

CASE NO. 61038

THE STATE OF NEW JERSEY :

: ACCUSATION

VS. :

Edward Rosenberg

Defendant :

Edward Rosenberg, having been charged upon oath, before a Magistrate in the said County of Monmouth, with Theft, N.J.S. 2C:20-3

and having in writing, addressed to the County Prosecutor, waived indictment and trial by jury and requested to be tried upon said charge by the Court, and said request having been duly reported and granted:

FIRST COUNT

The County Prosecutor of said County of Monmouth, alleges that the said Edward Rosenberg on the 20th day of November 1980, in the Township of Ocean, in the County aforesaid and within the jurisdiction of this Court did, Purposely and unlawfully commit a theft of cash of a value of over $500.00 from Celia Demico, an employee of Shop Rite Stores, contrary to the provisions of N.J.S. 2C:20-3 and against the peace of this State, the Government and dignity of the same.

PA1

SECOND COUNT

And the County Prosecutor of said County of Monmouth, alleges that the said Edward Rosenberg on the 20th day of November, 1980, in the Township of Ocean, in the County aforesaid and within the jurisdiction of this Court did, knowingly possess a weapon, to wit, a knife under circumstances not manifestly appropriate for such lawful purposes as it may have, contrary to the provisions of N.J.S. 2C:39-5d and against the peace of this State, the Government and dignity of the same.

COUNTY PROSECUTOR

DATED: December 24, 1980

PA2

Best Copy Available

SUPERIOR COURT OF NEW JERSEY
MONMOUTH COUNTY - CRIMINAL
ACCUSATION NO. 548-80
A-2811-80-4

X - - - - - - - - - - - - - - - -X

THE STATE OF NEW JERSEY, : Stenographic Transcript

-vs- : of Retraction

EDWARD ROSENBERG, : PLE
a/k/a DAVID GOVE
Defendant, :

X - - - - - - - - - - - - - - - -X

Monmouth County Court House
Freehold, New Jersey
December 24, 1980

B E F O R E :

HONORABLE DONALD J. CUNNINGHAM, J.S.C.

A P P E A R A N C E S :

LEO COX, ESQ.,
Assistant Monmouth County Prosecutor,
For the State of New Jersey

ALLEN SUSSER, ESQ.,
For the Defendant

HUGH PORTER, C. S. R.
OFFICIAL STENOGRAPHIC REPORTER
MONMOUTH COUNTY COURT HOUSE
FREEHOLD, NEW JERSEY 07728

PA 3

THE COURT: Mr. Cox?

MR. COX: Your Honor, this is the matter of State versus Edward Rosenberg. I have discussed this matter with Mr. Susser who represents Mr. Rosenberg and I'm advised his client wishes to plead guilty to an Accusation charging him with theft, third degree, and possession of a weapon, to wit: A knife.

It's the State's recommendation that Counts One and Two of the Accusation run concurrent to each other and at the time of sentencing the State will move to dismiss Municipal Court Complaint WF32482. The State will make no recommendation as to any specific sentence.

I hand the Court executed copies of the plea papers.

THE COURT: Thank you, Mr. Cox. Would you swear Mr. Rosenberg, please?

E D W A R D R O S E N B E R G,

being first duly sworn according to law, testified as follows:

EXAMINATION BY THE COURT:

Q Thank you. Give that to Mr. Rosenberg. Mr.

Rosenberg, in this matter it is my understanding that you are willing to plead guilty to an Accusation?

A. Yes, sir.

Q. Essentially you have a right to be indicted by the Grand Jury and to proceed in that way by Indictment. You can circumvent that by agreeing that you will waive the requirements of Grand Jury Indictment.

I have here a document which indicates you will, in fact, waive that Indictment and that's correct?

A. Yes, sir, I'm guilty.

Q. Well, that's not the point yet. On the question of the Grand Jury, you are willing to waive that, you have talked with Mr. Susser about what that means?

A. Yes, sir.

Q. I'll execute my approval of the Waiver of Indictment and we'll proceed with regard to the Accusation.

That Accusation sets forth that you are charged with theft in the third degree, unlawful possession of a weapon. Can you tell me the circumstances under which these arose? What was stolen?

A. Well, Your Honor, I didn't intend on stealing any money, I went in there to steal meat.

Q. This was what store?

A. I think it's Shop-Rite, Town of Ocean. I went in there to steal meat. I had been drinking earlier, no.

P45

excuse, you know, because I drink frequently.

Q What do you drink when you drink?

A Jack Daniels. This particular night I was drinking a couple of quarts of wine. I didn't have any money. When I walked in the store I walked past the register, the register was open and I saw the money and it just clicked, you know, I turned around, I took out a piece of gum, put it on the counter, I gave her a dollar bill. When she opened the register I didn't say a word to her, I just reached in the till and started to run and two guys jumped on me and got me on the ground.

Q Right. You realize that does constitute a crime of theft?

A Yes, sir.

Q And with regard to the unlawful possession of a weapon, what did you have?

A Well, Your Honor, I always carry it, it's a knife, I use it, you know, on my job.

Q Right. You realize the circumstances under which you were carrying it there in the course of committing a crime makes that possession something more than just the ordinary possession of a working instrument; in other words, the surrounding circumstances, how you were holding the knife, in this case you were holding it while committing a crime, in the sense of possessing it.

PAG

A Yes, sir.

Q And to these charges, by pleading, you are also waiving your right to remain silent, you are talking to me, your right to a Jury Trial and your right to have the witnesses against you cross examined by Mr. Susser, do you understand that, too?

A Yes, sir.

Q Mr. Susser has advised you to plead guilty. Are you satisfied with his competence as an attorney to handle your matter? A Yes, I am.

Q All right. And the penalties which pertain to these matters, the maximum penalty of five years with regard to the theft, a penalty as much as a year and a half with regard to the possession of the knife?

A Yes, sir.

Q A maximum then of six and a half years and a fine of as much as $15,000 or both, right?

A Yes, sir.

Q By virtue of the plea bargain the Prosecutor will recommend to me the sentences imposed run concurrently, at the same time. In effect, then, the one and a half year exposure is swallowed up by the five year exposure. That still leaves a possible five years.

A Yes, sir.

Q Do you have any prior record?

PAZ

A. No, just juvenile, fighting and drinking.

Q. The presumptive sentence would be four years with regard to the theft. I don't know what sentence I would give. It turns on your background as I analyze it from the pre-sentence report. Has anybody made any specific promise to you other than what we have discussed as to what sentence you would get?

A. No, sir, just the two Counts to run concurrently.

Q. Anybody made any threats to force you to plead?

A. No, sir.

Q. Do you have any questions about anything we're doing?

A. Not really.

THE COURT: Is there anything else the Prosecutor wants to develop?

MR. COX: No, Your Honor.

THE COURT: Thank you. I have talked to Mr. Rosenberg, I am satisfied he understands what he is doing. He is pleading guilty voluntarily and intelligently, having had the benefit of competent counsel because he is, in fact, guilty and not because of any threat or promise other than the plea bargain as outlined on the record.

According, the pleas of guilty to these

RA8

charges are accepted. I will fix February 6th as the date for sentencing and I direct a pre-sentence report be prepared and be available to me at that time.

What bail has been fixed in this matter, Mr. Susser?

MR. SUSSER: Your Honor, bail is at $10,000. The Bail Project became involved in this matter and it was really -- bail was set based upon the representation from Mr. Rosenberg and his girlfriend with whom he lives in Belmar that they could make that.

The bail bonds people would only accept the property deed which they don't have. At this time and I alluded to it earlier, Your Honor, I would request at this time if the Court would wish me to elaborate, that bail either be that Mr. Rosenberg be released on his own recognizance with restrictions on travel or that that bail we reduced.

He is gainfully employed. I'm waiting for his girlfriend to come in with a written statement from his employer.

THE COURT: What bail can he make?

MR. SUSSER: $2,500, I think. I'm in con-

tact with the bail people, we're hoping that they can put up whatever personal property they have.

THE COURT: When will you get the word on that?

MR. SUSSER: I could get it written at least after lunch, I understand the Court is recessing until 1:30.

THE COURT: Well, actually we're going to close the Court as of 12:30.

MR. SUSSER: Your Honor, Mr. Rosenberg works on a fishing boat out of Point Pleasant. The boat goes out every ten days and takes a couple of days off and then goes out another ten days. As to the possession of the knife, that's what he uses for his employment.

He lives in Belmar, he's been living there for about twelve or thirteen months, he's been employed with the same people.

I spoke to the employer and the employer's wife, he was out on the boat at the time. The recommendation from them was very favorable. I'm assuming the same would be placed in writing and we will provide the Court with that writing.

PA10

THE COURT: Where did Mr. Rosenberg live before Belmar?

MR. SUSSER: New York City. That's the address he had given originally when he was arrested. He is gainfully employed as I said, he intends to make his permanent residence in New Jersey. He will sign a waiver of extradition if he is released on his own recognizance and he will consent to a restriction of travel within the county until disposition of this matter.

We would also request, if the Court does set bail and the bail is not -- if it's impossible for them to make bail for an early disposition of the matter, as you can see, Your Honor, he's not denying this, he's a thirty year old individual, no prior adult record.

THE COURT: I fixed the sentencing date with the thought that he would be out. Otherwise I would have given January 23.

MR. SUSSER: Right. See --

THE COURT: I would like to see him on the street if I can feel secure.

THE DEFENDANT: Thank you, Your Honor.

THE COURT: Not yet, I still want to get

$2,500 bail if I can. Can you find out any faster whether it can be done.

MR. SUSSER: Your Honor, my aunt is a bail bondsman in the county.

THE COURT: Can you reach her?

MR. SUSSER: I think I can reach her. I'll call her at home right now and then if I can't reach her at home I'll call my mother and ask her where she is. She will be at our house today for Christmas Eve dinner.

THE COURT: I will fix bail at $2,500.

THE DEFENDANT: Thank you very much, Your Honor.

MR. SUSSER: I think we can make that, Your Honor.

THE COURT: The only point I want to emphasize to you, I would like to see you out on the street certainly until sentencing, then I'll know how I should handle it from there on. You can embarrass me a great deal if you take off.

THE DEFENDANT: Your Honor, I want to marry this girl, I have been living with her for a year.

THE COURT: If you take off it will add

to your problems, you have a separate charge and I would look like a goof.

THE DEFENDANT: I won't do that, Your Honor.

THE COURT: I'll fix bail at $2,500. If it can't be made, get in touch with me and I'll see what I can do.

MR. SUSSER: Oh, Your Honor, one other matter: On the $2,500 bail I think it's no problem if the Court permits a ten percent cash deposit as opposed to going through a bail bondsperson. I'm sure the family can raise that kind of money.

THE COURT: Yes, I will let a ten percent cash deposit be placed on $250 and that will stand for the $2,500 bail.

THE DEFENDANT: Thank you very much, Your Honor. Have a Merry Christmas.

(Whereupon the retraction was concluded.)

* * * * *

CERTIFIED TO BE A TRUE AND ACCURATE TRANSCRIPT OF THE WITHIN PROCEEDINGS.

Hugh Porter

HUGH PORTER, C. S. R.
OFFICIAL STENOGRAPHIC REPORTER

PA 13

MONMOUTH COUNTY

LAW DIVISION - CRIMINAL

Indictment No. A 548-80

~~Accusation No.~~ (2 Counts)

S.B.I. No.

DATE OF ARREST 11-20-80

THE STATE OF NEW JERSEY

—VS—

EDWARD ROSENBERG (a/k/a David Bove)

Defendant

JUDGMENT OF CONVICTION AND ORDER FOR COMMITMENT

The defendant, on December 24, 1980 having entered a plea of ~~not~~ gui

to ~~Indictment~~ Accusation No. A548-80

for the crime(s) of Theft, NJS 2C:20-3 (Count 1); Possession Unlawful Weapon, NJS 2C:39-5d (Count 2)

and the defendant having on

☐ RETRACTED A PLEA OF NOT GUILTY AND ENTERED A PLEA OF GUILTY TO:

☐ BEEN TRIED without / with A JURY AND A finding / verdict OF GUILTY TO:

having been rendered on

IT IS, THEREFORE, on February 27, 1981

Ordered and Adjudged that the defendant be and is ~~sentenced~~ committed to the custody of the Commiss of the Department of Corrections for a term of ten (10) years on Count One of the Accusati and for a term of eighteen (18) months on Count Two of the Accusation to run concurrent wi Sentence on Count One. Defendant not eligible for parole before five years. The defendar pay a penalty of $25.00 on each count ($50.00 total) to Violent Crimes Compensation Board. Municipal Complaint WF32482 dismissed on motion of Michael Pappa, Assistant Prosecutor.

STATEMENT OF REASONS REQUIRED BY R.3:21-4(e) APPEARS ON THE REVERSE SIDE

IT IS FURTHER ORDERED THAT THE SHERIFF DELIVER THE DEFENDANT TO THE AFORE-NAMED INSTITUTION TO SERVE HIS SENTENCE.

PA 14

ATTORNEY FOR DEFENDANT

Upon entry of Guilty Plea or Conviction

Robert Susser - Attorney

At time of Sentencing

Robert Susser - Attorney

James J. Clayton

County Clerk

February 27, 1981

Date

Defendant to receive R.3:21-8 credit for time sp in custody.

From _____ to _____

Days credit 44

Donald J. Lynch

Judge

DONALD J. CUNNINGHAM J.S.C.

Admin. Office of the Courts

Form No. CR- 33 1/78

(ov

STATEMENT OF REASONS, R.3:21-4(e)

RE: EDWARD ROSENBERG
A/K/A DAVID BOVE
ACC. #548-80

Defendant is a danger to society, with a bad record and a tendency toward irrational violence. While the crimes involved are usually non-violent, in this case the woman who was present and in custody of the snatched funds was severely upset by this snatching of the money. This is an aggravating factor.

February 27, 1981
Date

Judge
DONALD J. CUNNINGHAM, J.S.C.

PA 15

John a.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - CRIMINAL
MONMOUTH COUNTY ACC. NO. 548-80
APP. DIV. DKT. NO. A-2891-80-T4

STATE OF NEW JERSEY vs. DAVID BOVE AKA EDWARD ROSENBERG, Defendant.	STENOGRAPHIC TRANSCRIPT OF SENTENCE

Monmouth County Courthouse
Freehold, New Jersey

February 27, 1981

B E F O R E:

THE HONORABLE DONALD J. CUNNINGHAM, J.S.C.

TRANSCRIPT ORDERED BY:

OFFICE OF THE PUBLIC DEFENDER

A P P E A R A N C E S:

MICHAEL PAPPA, ESQ.
Assistant Prosecutor
Attorney for the State of New Jersey

ROBERT SUSSMAN, ESQ.
Attorney for the Defendant

JAMES W. OVERBY, C.S.R.
Official Court Reporter
Monmouth County Courthouse
Freehold, New Jersey

PA16

MR. PAPPA: If the Court please, the State would now move for sentence of Edward Rosenberg, also known as "Rosie", also known as David Michael Rosenberg on Accusation 548-80. In this matter, Your Honor, I've had occasion to speak with Mr. Sussman and the State will now move for an extended term sentence.

I've drawn up the notice of motion. I've provided a copy of this to Mr. Sussman and I will present the Court now with a notice of motion for the extended term.

THE COURT: All right, thank you. Mr. Sussman, is there any objection to this motion?

MR. SUSSMAN: Your Honor, at this time the defendant does not object to the application of the Prosecutor's Office both as to the time in which the application is being made in light of the circumstances of this case, and in the substance of the application; although we do wish to be heard on the Court's discretion in imposing an extended term as well as the Court's discretion in setting a minimum parole date under the new Code.

THE COURT: As I see it then, that

requires a hearing. Isn't that so?

MR. PAPPA: Unless the defendant consents to being sentenced to an extended term.

THE COURT: I don't think he does. As I hear Mr. Sussman, while he has no objection to you making this application, he resists the concept that an extended term should be granted. And with that I think you resist the concept that I think there should be a minimum non-parole eligibility period.

MR. SUSSMAN: What I'm saying, we do not object to an extended term being imposed on the Prosecutor's motion, but Your Honor under the Statute, it's not mandatory upon the Prosecutor's motion.

THE COURT: The Prosecutor is moving for a five year maximum to a ten year maximum.

MR. SUSSMAN: That's correct.

THE COURT: And if I grant that, the defendant could be then exposed to a five year period without eligibility for parole.

MR. SUSSMAN: That is correct. I would want to be heard on that aspect.

THE COURT: In opposition to it?

MR. SUSSMAN: Yes, very much, Your Honor.

THE COURT: That's where I think the problem arises.

MR. SUSSMAN: That is, Your Honor, my reading of the Statute that it's in Your Honor's discretion to impose, in addition to the extended term, a minimum parole date.

THE COURT: Yes.

MR. SUSSMAN: So at this point we're talking about a five to ten year term with a presumptive under the Code of seven years and with the exposure that should Your Honor so decide, as opposed to a seven year presumptive and let the chips fall where they may in terms of the classification and corrections, for Your Honor to impose a minimum parole date, we would strongly object to; but that would be heard in the normal course of sentencing.

THE COURT: All right, and you have moved this for sentencing?

MR. PAPPA: Yes.

THE COURT: I will hear you on the aspect of extended term and minimum parole as well in the course of your argument on behalf of the defendant.

MR. SUSSMAN: Thank you, Your Honor.

Your Honor, we were before you on the plea of this matter, which was a plea to an accusation. The accusation number is 548-80. The accusation charges the defendant with theft and possession of a weapon to which the defendant readily admitted at the time of the plea.

The facts and circumstances of the offense are detailed in the presentence report and I need not go over those in detail. We have no exception to the facts and circumstances.

We feel that under the new Code there is a preponderence of mitigating factors over aggravating factors in terms of offense, which was committed in this case.

The problem we have here, Your Honor, and the reason for all the delay in discussion in this matter at the time of the plea, at the time of my prior conversation with this individual, he indicated to all authorities that his name was Edward Rosenberg, a man thirty-two years of old, without a prior record. His admitted motivation for that was avoiding a custodial term on the offense for which he was charged.

Subsequently it come to the knowledge of the Court, the Probation Department and the

Prosecutor's Office and to myself that Edward Rosenberg is, in fact, David Bove with a prior criminal record, reflecting a narcotics conviction in 1969, a robbery conviction in 1971 and a robbery conviction in 1974.

And that forms the basis for the application by the Prosecutor for an extended term to which we did not object. The defendant's background is essentially one of narcotic use. He was addicted to heroin for several years.

According to the information that I received from him, this narcotic use lasted about eight to twelve years. The offense which forms the basis for this sentencing did not involve the use of narcotics. It did, however, involve a situation where the defendant states that he was extremely intoxicated at the time that he built up the courage to commit the act, which he admitted to participating in.

The defendant was released from custody I believe in New York in July of 1980. He is a local man. He lived in Belmar, was born and raised in that area.

His parents live in that area, contrary to many of the facts which were originally set

forth in the presentence investigation.

Upon being released from custody, he did obtain gainful employment. He became involved with a girlfriend who is in Court today. I feel that those two factors were the start of something new for this individual.

He's been in institutional settings for about eight of his last twelve years. He was on his way, he was getting a start. He had involved himself in a Methodone program.

He tried to get into that program immediately after his release from the New York Correctional System, but his admission was delayed because there was a waiting list and he was admitted in December of 1980.

This event occurred, I think in October of 1980, and it was the one event that really sent Mr. Bove on his way down the roller coaster.

He's in a position right now for the Court to determine how much further down he is going in his life. It is our feeling that we're cooperating in the sense that we do feel that an extended term, placing the maximum exposure of ten years, is a recognition on our part that the defendant is not only paying in this instance

for the crime that he did commit; but he's also paying for the prior record that he does have.

He paid for some of that prior record with his incarceration in New York. He was incarcerated for a period of a full five years. And under our new Code, we're now requiring people who have a prior record, past criminal involvement, not only pay for the crime they have committed, but to face the music on the prior record.

I don't think Mr. Bove's coming here before Your Honor, under the facts of this case, that there are other facts that come into involvement, especially the situation with his girlfriend. At the time of the pleas before Your Honor, he expressed his love for his girlfriend. The fear of losing her at this point in hindsight after the things that he did get himself involved in is probably one motivating factor where he's seeking some sort of leniency from the Court.

As Your Honor recognizes the aspect of this sentence that we're pushing for is not for Your Honor to set a minimum parole date for the defendant to take his whack with the extended

term but let his progress and his participation in the Department of Corrections determine when he will be released.

Your Honor, the facts of the offense again I say are mitigating. I feel that it's a strong aspect. It's an important aspect of this case for the Court to consider.

The defendant was clearly afraid of going to jail. He had a prior record. He gave a false name, and he was successful in that charade for some time.

But the system caught up with him, as the system often does. It's not perfect, but it does have a means of effectiveness and it was effective in this case.

I feel we do have to give this individual some hope, however, that there is some light at the end of the tunnel, and to turn that light off and to give him absolutely no hope in his participation in the criminal justice system, is not going to serve anyone.

He did get a start on his life. He did become employed. He was laid off. And being laid off was a big blow to him. He thought he had had things going right. He had a girlfriend.

He had a somewhat stable living environment.

When he lost his job shortly thereafter, he really felt the shot in the back and it precipitated these offenses. And when these events occurred, the offense here, the theft occurred, let me tell you he was on the top of the roller coaster and he's been going down ever since.

I'm not asking for the Court's sympathy; I'm just asking for the Court to give the defendant, Mr. Bove an opportunity of some sort. The extended term defeats that opportunity. A minimum parole date erradicates that opportunity. And I feel that warehousing him in the New Jersey System at this point is not going to serve anyone. Thank you.

THE COURT: Mr. Bove, you have a right to address the Court if you wish if there is anything you want to add to what Mr. Sussman has said and what I've read.

THE DEFENDANT: No, Your Honor I think he's about covered it all except he didn't know anything about who I really was.

THE COURT: All right, I understand and I appreciate that clarification.

Mr. Bove, under the name of Edward Rosenberg, pleaded guilty to accusation 548-80 and in that plea bargain negotiated with him the charges were fixed as theft, although it was very close to being an armed robbery and possession of a knife. It was agreed then that the charges would be run concurrently, the theft having a maximum penalty of five years imprisonment, the possession of a knife a maximum penalty of eighteen months.

Since that time, other information has come to light with regard to the defendant, which prompted the Prosecutor to seek to go back on the plea agreement. It was in effect negotiated with the Prosecutor making a motion for an extended term based on the defendant's prior record. As an extended term, the maximum for this third degree offense would not be five years, but would be ten years. I think that motion is sound, and accordingly I fix that as the extended term, ten years.

And the fact remains that the other charge must run concurrently with that. For the sentence which is imposed as to the first count, the theft, is a maximum ten years. The sentence

with regard to the possession of a knife is eighteen months, but it is concurrent with the ten year sentence.

The defendant's eligibility for parole certainly would have him out long before that, however, the Court has the authority to fix a minimum period within which the defendant will not be eligible for parole, as much as one-half of the maximum. Accordingly, I fix a period of five years as the time within which the defendant is not eligible for parole.

I've noted that the charge of theft usually is considered non-violent. In this case the woman in charge of the funds was severely upset. I consider this to be an aggravating factor as well as the defendant's bad record and his tendency towards irrational violence.

Credit is given for thirty-five days spent in custody. You have a right to appeal from this sentence. Bail is discharged.

MR. SUSSMAN: Excuse me, Your Honor, on the credit, the defendant was subsequently incarcerated.

THE COURT: Yes, I just realized that. The thirty-five days is from November 21st to

December 25th. He then was picked up on February 18th, which is nine days ago. So the credit should be forty-four days and that credit is given to him. Essentially it's a ten-year sentence.

THE DEFENDANT: I can't get out before five years? Well, my life is over. I'll see you. Monmouth County might as well give me a twenty year sentence. My life is over. Thank you, Your Honor. You are all going to see me again, all of you. My life is over. In five years a few other people are going to be over. Give me twenty, thirty, forty, and fifty.

THE COURT: Why don't you take it like a man.

THE DEFENDANT: Take it like a man, what did I do? I didn't harm nobody. Give me twenty, mother fucker.

I, James W. Overby, a Certified Shorthand Reporter of the State of New Jersey, do hereby certify that the foregoing is a true and accurate transcript of my stenographic notes.

April 24, 1981
Date

James W. Overby
JAMES W. OVERBY
Certified Shorthand Reporter

RECEIVED
APR 29 1981

DAVID BOVE #65985
RAHWAY STATE PRISON
RAHWAY, N.J. 07065

JANUARY 27, 1982

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2891-80T4

Greetings:

Please consider this letter as a rebuttal to the Brief submitted by the State.

On December 24, 1980, I signed a Plea Bargain Agreement with a maximum term of five years, no stipulation, no extended term. On February 27, 1981, I was given an extended term of ten years with a five year mandatory minimum.

First, I did not sign and or consent to or waive of a new or amended Plea Bargain. I am under the impression that a signed Plea Agreement cannot be changed without giving me the opportunity to take my plea back. When the Judge and my lawyer spoke of extended terms at Sentencing, I had no idea they were talking of an increase of time on my sentence. I am not a lawyer and do not know legaleese, especially new laws and statutes. I have my lawyer no permission to change the Plea Agreement which I signed. The Court knew this as evidenced by the statement of the Judge that "I don't think he does." (consent to extended term) Sentencing Transcript, Page 3, 2-4

PA30

Second, I was informed, in plain language that I could understand, of the altered Plea Bargain and the

consequences of that bargain in one sentence and the Sentenced in the very next sentence without giving the opportunity,,once I heard it in laymans terms, to disagree with this altered Bargain and to ask for my plea back. Sentencing Transcript, Page 11, 11-21
I never resisted withdrawing my plea back; I was never given the opportunity to do so.

Third, the State argues that I did not raise the issue of my having inadequate knowledge of the consequences of my plea. D.A.'s Brief, Page 6, 13-16 On the contrary, I sent my Appeal lawyer a letter dated May 12, 1981, stating that I would like this very issue raised in my brief. (Da-10, Page 2) He did not.

Fourth, I also asked him to raise in the brief the issue of my right to a jury trial on my extended term and he did not. (Da-10, Page 3)

I have attached my argument for a jury trial on my extended term. (Da-11)

The omission of the above issues in my Appeal was beyond my control as I had asked my Appeal lawyer to raise them.

I realize that this is being submitted late but as a laymen I had a difficult time researching and constructing this Rebuttal.

Thank you.

PA31

David M. Bey

PROOF OF SERVICE

I, David Bove, hereby affirm that on the 27 day of January, 1982, I served a true and correct copy of a letter with supporting papers to be considered as a rebuttal to the Brief submitted by the State, upon the Deputy Attorney General, Victoria Curtis Bramson, Division Of Criminal Justice, Appellate Section, P.O. Box CN24, Princeton, New Jersey 08540, via United States mail.

David M. Bove
DAVID M. BOVE
Defendant

CERTIFICATION IN LIEU OF OATH

I hereby affirm that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

David M. Bove
DAVID M. BOVE
Defendant

Dated:

RIGHT TO JURY TRIAL, EXTENDED TERMS

In England, jury trial was recognized as a right as early as the begining of the thirteenth century. Magna Charta, Secs. 39 (criminal), and 52, 56 and 57 (civil);[1] see also, Dunham, Jr., Magna Carta & British Constitutionalism, in The Great Charter: Four Essays on Magna Carta & History of Our Liberty 26-28, 41-42, 132 (1965). Englishmen of the period

-Cont'd-

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[1] Magna Charta of 1215

. . .

39. No freeman shall be taken or imprisoned, or disseised, or outlawed, or banished, or any ways destroyed, nor will we pass upon him, nor will we send upon him, unless by the lawful judgment of his peers, or by the law of the land.

. . .

52. If any one has been dispossessed or deprived by us, without the legal judgment of his peers, of his lands, castles, liberties, or right, we will forthwith restore them to him; and if any dispute arise upon his head, let the matter be decided by the five-and-twenty barons hereafter mentioned, for the preservation of the peace. As for all those things of which any person has, without the legal judgment of his peers, been dispossessed or deprived, either by King Henry our father, or our brother King Richard, and which we have in our hands, or are possessed by others, and we are bound to warrant and make good, we shall have a respite till the term usually allowed the crusaders; excepting those things about which there is a plea depending, or whereof an inquest hath been made, by our order, before we undertook the crusade, but when we return from our pilgrimage, or if perchance we tarry at home and do not make our pilgrimage, we will immediately cause full justice to be administered therein.

. . .

Sections 56 and 57 extend the abovementioned rights and terms to Welshmen.

could not be tried unless they consented to trial, and were tortured until death or until they consented.[2/] The practice of torture, known as piene forte et dure, prevailed until 1772 when the failure to plea was lawfully permitted to be interpreted as a plea of guilty. In 1827, England provided by statute for the trial of those who stood mute. In virtually all events—from the thirteenth century forward—compulsory trial was to a jury. Singer v. United States, 1965, 85 S. Ct. 783, and the authorities cited therein. Thus the right to jury trial attached in civil matters involving "lands, castles, liberties, or right," and in criminal matters wherein the accused could be "imprisoned, or disseised, or outlawed, or banished, or any ways destroyed." Magna Charta, Sects. 52 and 39, respectively.

Echoing the earlier English laws, the framers of our Constitution declared that "(i)n all criminal prosecutions, the accused shall enjoy the right to . . . trial, by an impartial jury," and "(i)n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." Bill of Rights, Sects. 6

-Cont'd-

2/ As English codes provided the death penalty for hundreds of lawbreakings (Flynn, Jails and Criminal Justice, in Prisoners In America 159, L. Olhin ed. 1973; and People v. Aaron, Mich. Supreme Court 1980, ___ Mich. ___, ___ N.W.2d ____, 49 LW 1105, in sixteenth century England practically all felonies were punishable by death), hardy defendants were willing to undergo death by torture to avoid conviction and entailing forfeiture of their lands with resultant hardships for their descendents.

and 7, respectively.[3/] For the most part, New Jersey's Constitutions have comported with federal constitutional standards.[4/] Generally, the

-Cont'd-

3/ Consider also, U.S. Const., Art. III, Sec. 2, cl. 3 ("The Trial of all Crimes . . . shall be by Jury"); and the colonists' complaint that England sometimes deprived them of trial by jury:

Declaration of Independence

. . .

The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States. To prove this, let Facts be submitted to a candid world.

. . .

For depriving us in many cases, of the benefits of Trial by Jury

4/ New Jersey Constitution of 1776

. . .

XVI. Criminals; their privileges

That all criminals shall be admitted to the same privileges of witnesses and counsel, as their prosecutors are or shall be entitled to.

. . .

XXII. Common and statute law of England, how far to be in force; trial by jury confirmed

That the common law of England, as well as so much of the statute law, as have been heretofore practiced in this colony, shall still remain in force, until they shall be altered by a future law of the legislature; such parts only excepted, as are repugnant to the rights and privileges contained in this charter; and that the inestimable right of trial by jury shall remain confirmed, as a part of the law of this colony, without repeal, forever.

(FOOTNOTE CONTINUED ON NEXT PAGE)

"twenty dollars" threshold has been honored at the state level (e.g., N.J. Const. of 1947, Art. 1, Par. 9), and on the federal level increased to

-Cont'd-

(FOOTNOTE CONTINUED FROM PRECEDING PAGE)

New Jersey Constitution of 1844, Article 1

. . .

7. Trial by jury; jury of six men

The right of trial by jury shall remain inviolate; but the legislature may authorize the trial of civil suits, when the matter in dispute does not exceed fifty dollars, by a jury of six men.

8. Rights of persons accused of crime

In all criminal prosecutions the accused shall have the right to a speedy and public trial by an impartial jury; to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel in his defense.

New Jersey Constitution of 1947, Article 1

. . .

9. Trial by jury; jury of six persons; verdict in civil causes; trial of mental incompetency without jury

The right of trial by jury shall remain inviolate; but the Legislature may authorize the trial of civil causes by a jury of six persons when the matter in dispute does not exceed fifty dollars. The Legislature may provide that in any civil cause a verdict may be rendered by not less than five-sixths of the jury. The Legislature may authorize the trial of the issue of mental incompetency without a jury.

10. Rights of persons accused of crime

In all criminal prosecutions the accused shall have the right to a speedy and public trial by an impartial jury; to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel in his defense.

$10,000 (e.g., 28 USC 1332, Diversity of citizenship); whereas federal civil rights suits need meet no jurisdictional amount (28 USC 1331, as amended 12/80, P.L. 96-486; and 28 USC 1343 and 42 USC 1983-4). Criminally, notwithstanding the "all criminal prosecutions" language of the Sixth Amendment, the U.S. Supreme Court qualified the right to jury trial to "nonpetty" crimes. Duncan Trilogy, 1968, 88 S.Ct. 1444 to 1488. "Nonpetty" has been defined as that which exposes the accused to a penalty of 6 months' or more imprisonment. Baldwin v. New York, 1970, 90 S.Ct. 1886, at 1888; Burch v. Louisiana, 1979, 99 S.Ct. 1623, 1626-7.[57] Thus the right to jury trial in civil matters attaches when the amount in controversy exceeds varying, specified amounts; and in criminal matters the jury trial right attaches when the potential penalty exceeds 6 months' imprisonment.

-Cont'd-

[51] Although not requiring jury trial, exposure to penalties which are less than "nonpetty" require varying degrees of procedural safeguards: Scott v. Illinois, 1979, 99 S.Ct. 1158 (right to counsel attaches to safeguard any loss of liberty; i.e., one day of incarceration); Vitek v. Jones, 1980, 100 S.Ct. 1254 (right to counsel attaches to safeguard stigma of mental illness and transfer from prison to mental hospital, notwithstanding no loss of actual liberty involved); Wisconsin v. Constantineau, 1971, 91 S.Ct. 507 (adjudication of 'public drunk,' with entailing prohibition, requires minimal due process); Morrissey v. Brewer, 1972, 92 S.Ct. 2593 (parole revocation requires minimal due process); Greenholtz v. Inmates, 1979, 99 S.Ct. 2100 (expectancy of parole requires less than minimal due process); and Wolff v. McDonnell, 1974, 94 S.Ct. 2963 (forfeiture of the type of commutation-time which does not reduce the length of the sentence—as distinguished from New Jersey's scheme—requires minimal due process).

"(B)ecause trial by jury in 'serious' criminal cases is 'fundamental to the American scheme of justice' and essential to due process of law, the Fourteenth Amendment guarantees a state criminal defendant the right to a jury trial . . , The purpose of trial by jury, as noted in Duncan, is to prevent government oppression by providing a 'safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.'" Burch, supra, at 1626, citing Duncan, supra, at 1451. Thus the right to jury trial is "fundamental" in instances where serious or grievous loss is threatened, and is intended to insure against imposition of corrupt and arbitrary penalties.

Abrogation of a "fundamental" right must meet the "compelling necessity test." McGinnis v. Royster, 1973, 93 S.Ct. 1055; Chicago Police Dept. v. Mosley, 1972, 92 S.Ct. 2286; U.S. ex rel. Hayden v. Zelker, CA2 1974, 506 F.2d 1228; Hetherton v. Sears, Roebuck & Co., CA3 1981, ___ F.2d ____, 50 LW 2023; Johnson v. Solomon, D.Md. 1974, 484 F.Supp. 278. As the enhanced penalty in the instant case exceeds 6 months (to wit, 5 years), and as the State is unable to demonstrate a rationally related "compelling necessity" which would be satisfied by the deprivation of jury trial in the persistent offender scheme, satisfaction of

-Cont'd-

RIGHT TO JURY TRIAL, EXTENDED TERMS (Cont'd)

NJS 2C:44-6(e)[6] is constitutionally inadequate and defendant must be afforded a jury trial, wherein he is afforded the Fifth Amendment right against self-incrimination (Estelle v. Smith, 1981, 101 S. Ct. 1866; right against self-incrimination attaches at penalty phase if faced with enhanced, extended, or extraordinary term), Sixth Amendment right to counsel (Chandler v. Fretag, 1954, 75 S. Ct. 1, recognizing federal constitutional right to retained counsel in habitual offender sentencing; Gideon v. Wainwright, 1963, 83 S. Ct. 792, recognizing indigents' constitutional right to counsel), the presumption of innocence (Sandstrom v. Montana, 1979, 99 S. Ct. 2450), confrontation, cross-examination and compulsory process for obtaining witnesses in his favor (6th Amend.; NJS 2C:44-6e), and wherein the State bears the burden of proof of every element of the enhanced criteria beyond a reasonable doubt (Jackson v. Virginia, 1979, 99 S. Ct. 2781).

-Cont'd-

[6] NJS 2C:44-6. Procedure on Sentence; Presentence Investigation and Report

. . .

(e) The court shall not impose a sentence of imprisonment for an extended term unless the ground therefor has been established at a hearing after the conviction of the defendant and on written notice to him of the ground proposed. The defendant shall have the right to hear and controvert the evidence against him and to offer evidence upon the issue.

It is evident from the sporadic application of the persistent offender statutes that enhanced sentencing is being arbitrarily—and consequently corruptly—applied;[7] and ergo, that the underlying rationale for jury trial applies in the instant case with full force and effect.[8] Concededly, it is far wiser to enhance the exposure of a repeat offender,

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7 State v. Kozarski, N. J. Law Div. 1974, 128 N. J. Super. 513, at 520 n. 5 (out of 72,000 criminal cases, multiple offender sentencing was invoked only once). The Kozarski 72,000 to 1 ratio has only minutely improved under 2C (Administrative Office of the Courts, Yearly Review of Sentencing Guidelines).

8 While it is true that extended terms are now being more frequently imposed than under the old law (approximately 1% of those who qualify, as apposed to 1 in 72,000; see preceding footnote), the extended term penalties have been drastically increased, as demonstrated in the following overview, causing the abject selective enforcement to be now more prejudically pronounced than in Kozarski; though more have it, those few who do are made far more conspicuous by it:

The harshest possible extended term which could be imposed under 2A was life (NJS 2A:85-12) with its entailing primary parole eligibility after service of between 11-years-and-7-months and 16-years-and-6-months (C. Dietz, The Parole Book, 1978, p. 15, l. 39; Attached); and that penalty had to be based on 3 prior "high misdemeanor" convictions (stat. cit.) as found by a jury (NJS 2A:85-13; see footnote 10, infra). Under 2C, the harshest extended term is 25-to-life (NJS 2C:43-7b & c); and that penalty can be based on merely 2 prior misdemeanor convictions (NJS 2C:44-3 and 2C:44-4), without benefit of jury trial (NJS 2C:44-6e; see footnote 6, infra). Clearly the difference between old and new is extreme; indeed, as the maximums in the given example are the same under old and new, the only difference in the duration of the term is the amount of time the defendant must serve imprisoned; and that—give or take a couple months—has been doubled. It is also noteworthy that under NJS 30:4-123.12, last paragraph, those who were sentenced to enhanced terms pursuant to NJS 2A:85-8 et sqq., were relieved of the onus of multiple offender classification (NJS 30:4-123.12a, b & c).

rather than fixing a great, oftentimes disproportionate penalty to commission of a single offense; and these arguments are not to be construed as a constitutional challenge to persistent offender sentencing, per se, but rather as a challenge aimed at narrowing selective enforcement. Indeed, even deprivation of jury trial, itself, seems to be selective in view of the jury trial afforded in May of 1981, in the case of State of New Jersey v. James Gadson, Ocean Indictment No. 307-80, charging Gadson with being a "Subsequent Offender" pursuant to NJS 24:21-29,[9] as the result of a third conviction had on December 17th, 1980 (some 16 months after 2C took effect) for distribution of CDS subsequent to the effective date of Title 2C; and in view of the State having recognized the right to jury

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[9] NJS 24:21-29. Second or subsequent offenses

a. Any person convicted of any offense under this act, if the offense is a second or subsequent offense, shall be punished by a term of imprisonment of up to twice that otherwise authorized, by up to twice the fine otherwise authorized, or both; provided, however, that this section shall not apply to section 20a (3) and (4) and b (24:21-20a3 and 4; and b) offenses.

b. For purposes of this section, an offense shall be considered a second or subsequent offense, if, prior to the commission of the offense, the offender has at any time been convicted of an offense or offenses under this act or under any law of the United States or of any state relating to narcotic drugs, marihuana, depressant, stimulant, or hallucinogenic drugs.

trial for more than 81 years preceding September 1st, 1979.[10]

The only court which addressed virtually identical issues head on, to this researcher's knowledge, was U.S. v. Bowdach, CA5 1977, 561 F.2d 1160; a rather unusual case in that the constitutional challenge to deprivation of jury trial in enhanced offender sentencing was never recognized or addressed by the trial court (S. D. Florida 1976, 414 F. Supp.

-Cont'd-

[10] NJS 2A:85-13. Procedure on sentencing repeat offenders; waiver of jury trial

> . . . (the court shall cause the accused repeat offender) to be brought before it and shall inform him of the allegations contained in (the) accusation and of his right to be tried as to the truth thereof, and shall require such person to plead to the accusation. If such person refuses to plead or remains silent or pleads not guilty, a not guilty plea shall be entered and a jury shall be impanelled to inquire whether said person is guilty as outlined in sections 2A:85-8, 2A:85-9 and 2A:85-12 of this Title, respectively.
>
> If the jury finds said person guilty or if he pleads guilty or non vult, the court may sentence him to the punishment prescribed in sections 2A:85-8, 2A:85-9 and 2A:85-12, as the case may be.
>
> The said person shall have the right to waive, in writing, the trial by jury provided in this section, and if he shall do so, the court, in its discretion, may accept the waiver and try and decide the issue without a jury, and if the said person is found guilty, the court may impose the same sentence as though said person had been found guilty by the jury.

Source: L. 1898, c. 235, Sec. 219, et seq.

It is interesting that despite 2C extended terms being generally harsher than their 2A counterparts (see footnote 8, infra), and instantly harsher insofar as protracted parole eligibility, see footnote 8, infra, the 2A law recognized the right to jury trial, whereas the 2C law does not.

1346), apparently was not taken to the U.S. Supreme Court, and Bowdach suffered no increased penalty, or no significantly increased penalty, as the result of conviction as a "dangerous special offender." Notwithstanding, CA5 held that jury trial was not required because "the accused's only defenses are that he is not the person mentioned in the previous convictions or that the convictions are void." At 1175. In reaching its conclusion, CA5 attempted to reconcile Specht v. Patterson, 1967, 87 S.Ct. 1209, with Williams v. New York, 1949, 69 S.Ct. 1079, and interestingly, gave more weight to the 1949 Williams' holding dealing with ordinary sentencing (albeit a death sentence), over the 1967 Specht holding dealing with enhanced sentencing and adopting the Third Circuit's rationale in U.S. ex rel. Gerchman v. Maroney, CA3 1967, 355 F.2d 302, to the effect that the full panoply of due process protections apply in extended term sentencing. Specht at 1212, Gerchman at 312. The Specht Court also relied on Graham v. State of West Virginia, 1912, 32 S.Ct. 583, inasmuch as the "prior conviction of another offense . . . is a distinct issue" (32 S.Ct. at 586; Specht at 1212). Indeed, any accused's only defenses are that he is not the person who committed the crime or that no crime has been committed; but it is no accused's burden to prove that he did not commit a

-Cont'd-

crime, and likewise for repeat offender defendants. Sandstrom, supra, and Jackson, supra (the accused is presumed innocent until after the State proves, beyond a reasonable doubt, to the jury, all of the elements prerequisite to the special offender conviction).

Defendant's failure to assert his constitutional right to jury trial to the court below, should not be viewed as a valid waiver because such failure was not even purposeful, let alone knowing and intelligent. Adams v. U.S., 1942, 63 S.Ct. 236 (waiver of right to jury trial must be an intelligent or informed waiver); Faretta v. California, 1975, 95 S.Ct. 2525 (in order to be valid, waiver of a constitutional right must be with full understanding of the nature and consequences of the right and the waiver); Boykin v. Alabama, 1969, 89 S.Ct. 1709 (same); and Burgett v. State of Texas, 1967, 88 S.Ct. 258 (same).

THE PAROLE BOOK

A HANDBOOK FOR STATE PRISON INMATES
ON PAROLE PROCEDURES

NEW JERSEY STATE PAROLE BOARD
WHITTLESEY ROAD
P.O. BOX 7387
TRENTON, NEW JERSEY 08628

PA45

NEW JERSEY STATE PAROLE BOARD
POST OFFICE BOX 7387 WHITTLESEY ROAD
TRENTON, NEW JERSEY 08628
TELEPHONE NUMBER: (609) 292-4257

CHRISTOPHER DIETZ
CHAIRMAN

SALLY G. CARROLL
LUIS H. GARCIA
ASSOCIATE MEMBERS

December 1, 1978

The State Parole Board and its staff have worked on this handbook over the last year. It is our hope that this will help answer many of your questions and provide information about the parole process.

The handbook has two sections. The first section consists of questions and answers which respond to questions which are often asked by inmates. The second section includes the State Parole Board's Administrative Code, which includes the Rules and Regulations of the Board. In particular, you should note N.J.A.C. 10A:70-3.3, (page 30) which gives a listing of the factors usually considered by the Parole Board.

The privilege of parole is earned through your efforts to prepare yourself for return to the community as a law-abiding citizen. You will show this by a good institutional adjustment and your participation in education, work and vocational programs which will enable you to earn a living; counselling to gain an understanding of yourself and others so that you can learn how to deal with problems and control your behavior (actions); and cultural and recreation programs which make good use of your free time.

We hope you will make a serious and successful effort to earn parole.

Christopher Dietz, Chairman
NEW JERSEY STATE PAROLE BOARD

PA 46

APPENDIX II

STATE PAROLE BOARD

PAROLE ELIGIBILITY TABLE

A	B	C	D	E	F	G
Maximum Sentence	Flat Eligibility	Commutation Time (Good Time credits)	Estimated Work Credits (maximum possible)	Estimated Minimum Custody Credits (maximum possible)	Earliest Eligibility	Latest Eligibility
Years	yrs-mos	days	days	days	yrs-mos-days	yrs-mos-days
1	0 - 4	24	19	8	0 - 2 - 9	0 - 3 - 6
2	0 - 8	48	38	16	0 - 4 - 18	0 - 6 - 12
3	1 - 0	72	58	24	0 - 6 - 29	0 - 9 - 20
4	1 - 4	100	76	31	0 - 9 - 7	1 - 0 - 22
5	1 - 8	128	94	39	0 - 11 - 12	1 - 3 - 23
6	2 - 0	156	113	51	1 - 1 - 15	1 - 6 - 27
7	2 - 4	188	131	63	1 - 3 - 25	1 - 10 - 8
8	2 - 8	220	148	75	1 - 5 - 13	2 - 0 - 23
9	3 - 0	252	166	87	1 - 7 - 13	2 - 3 - 21
10	3 - 4	284	184	98	1 - 9 - 13	2 - 6 - 21
11	3 - 8	316	201	111	1 - 11 - 10	2 - 9 - 19
12	4 - 0	348	219	122	2 - 1 - 10	3 - 0 - 17
13	4 - 4	380	236	134	2 - 3 - 10	3 - 3 - 17
14	4 - 8	412	254	145	2 - 5 - 10	3 - 6 - 16
15	5 - 0	444	272	157	2 - 7 - 10	3 - 9 - 13
16	5 - 4	476	289	169	2 - 9 - 10	4 - 0 - 11
17	5 - 8	508	307	181	2 - 11 - 10	4 - 3 - 10
18	6 - 0	540	324	192	3 - 1 - 9	4 - 6 - 8
19	6 - 4	572	342	204	3 - 3 - 9	4 - 9 - 7
20	6 - 8	604	360	218	3 - 5 - 8	5 - 0 - 4
21	7 - 0	636	377	228	3 - 7 - 8	5 - 3 - 4
22	7 - 4	676	393	238	3 - 9 - 2	5 - 5 - 24
23	7 - 8	716	409	249	3 - 10 - 24	5 - 8 - 14
24	8 - 0	756	425	260	4 - 0 - 19	5 - 11 - 4
25	8 - 4	796	441	270	4 - 2 - 15	6 - 1 - 25
26	8 - 8	836	457	281	4 - 4 - 7	6 - 4 - 15
27	9 - 0	876	473	292	4 - 6 - 2	6 - 7 - 6
28	9 - 4	916	489	302	4 - 7 - 27	6 - 9 - 26
29	9 - 8	956	505	313	4 - 9 - 21	7 - 0 - 17
30	10 - 0	996	521	324	4 - 11 - 14	7 - 3 - 9
35	11 - 8	1196	601	377	5 - 8 - 16	8 - 4 - 20
40	13 - 4	1412	678	428	6 - 5 - 8	9 - 5 - 19
45	15 - 0	1632	754	478	7 - 1 - 28	10 - 6 - 12
50	16 - 8	1852	830	529	7 - 10 - 15	11 - 7 - 4
55	18 - 4	2088	903	578	8 - 6 - 23	12 - 7 - 12
60	20 - 0	2328	975	626	9 - 2 - 28	13 - 7 - 14
65	21 - 8	2568	1047	674	9 - 11 - 4	14 - 7 - 18
70	23 - 4	2824	1116	720	10 - 6 - 28	15 - 7 - 8
Life	25 - 0	3084	1184	626	11 - 7 - 3	16 - 6 - 18

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-2891-80T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DAVID BOVE, a/k/a EDWARD ROSENBERG,

Defendant-Appellant.

ORIGINAL FILED
FEB 23 1982
ELIZABETH McLAUGHLIN
Clerk

Submitted February 9, 1982. Decided FEB 23 1982

Before Judges McElroy and J. H. Coleman.

On appeal from Superior Court of New Jersey, Monmouth County, Law Division.

Stanley C. Van Ness, Public Defender, attorney for appellant (John M. Apicella, Assistant Deputy Public Defender, on the letter brief).

David Bove, appellant, filed a supplemental letter brief, pro se.

Irwin I. Kimmelman, Attorney General of New Jersey, attorney for respondent (James R. Zazzali, former Attorney General; Victoria Curtis Bramson, Deputy Attorney General, of counsel, and on the brief).

PER CURIAM

On December 24, 1980 defendant entered pleas of guilty to a third degree theft and possession of a knife. The plea agreement provided that defendant was exposed to a five year maximum sentence for the

theft and the sentence for possession of the knife was to run concurrent. At the time the plea was taken, the court and all counsel were under the impression that defendant's name was Edward Rosenberg who said he had no prior criminal record. However, by the date fixed for sentencing, the prosecutor had become aware that defendant's real name was not Rosenberg, but was David Bove who had a prior criminal record consisting of possession of a narcotics in 1969, an armed robbery in 1971 and a robbery in 1974.

After the defendant's name and criminal record were discovered, the defendant and the State renegotiated the plea agreement. The State was permitted to move for an extended term. The State did move to have an extended term imposed and counsel for defendant did not object. Defendant was sentenced to an extended term of 10 years for the theft. N. J. S. A. 2C:44-3a. and N. J. S. A. 2C:43-7a.(4). The court also imposed a parole ineligibility term of 5 years. N. J. S. A. 2C:43-7b. Also, a concurrent 18 month term was imposed for possession of the knife.

On appeal, defendant has asserted that (1) the sentence violated the plea agreement; (2) the sentence

should be reduced based on N. J. S. A. 2C:44-7; and (3) he was not informed that an extended term or parole ineligibility could be imposed.

We have considered the contentions and all arguments advanced by defendant in support of them, including the pro se supplemental letter brief, and find they are clearly without merit. R. 2:11-3(e)(2). Accordingly, the judgment of conviction is affirmed.

Affirmed.

I Hereby certify that the foregoing is a true copy of the original on file in my office.

Elizabeth McLaughlin

Clerk

Mr. David Bove (Petitioner)
#65985, New Jersey State Prison
Woodbridge Avenue, Lock Bag R
Rahway, New Jersey 07065

April 26th, 1982

Supreme Court of New Jersey
State House Annex
Trenton, New Jersey 08625

Re: State vs. David Bove
App. Div. #A-2891-80T4
N. J. S. Ct. #

Greetings:

This paper is defendant-petitioner's pro se supplemental petition for certification. Petitioner first received his defender's letter-petition for certification on April 23rd, 1982. The question now presented was presented to the Appellate Division under cover of 'defendant-appellant's pro se supplemental brief on appeal.'

Question presented. Whether those facing an enhanced penalty are entitled to a jury trial of the distinct prerequisite elements listed in the governing statute,* pursuant to the federal Sixth and Fourteenth Amendments? (This question was expressly ignored in State v. Maguire, N. J. Supreme 1980, 84 N.J. 508, at footnote 10.)

-Cont'd-

* The statutory prerequisite elements for extended term sentencing are:

(a) Persistent offender. "A persistent offender is a person who at the time of the commission of the crime is 21 years of age or older, who has been previously convicted on at least two seperate occasions of two crimes, committed at different times, when he was at least 18 years of age ..." (NJS 2C:44-3a).

(b) Professional criminal. "A professional criminal is a person who committed a crime as a part of a continuing criminal activity in concert with two or more persons, and the circumstances of the crime show he has knowingly devoted himself to criminal activity as a major source of livelihood." (NJS 2C:44-3b).

(c) Paid criminal. A paid criminal is a person who commits a crime for pecuniary gain, other than the proceeds of the crime; e.g., crime for hire. (NJS 2C:44-3c).

Legal argument. Generally, when the potential penalty exceeds six months of imprisonment, the right to jury trial attaches.* Burch v. Louisiana, 1979, 99 S. Ct. 1623; Baldwin v. New York, 1970, 90 S. Ct. 1886; and The Duncan Trilogy, 1968, 88 S. Ct. 1444 thru 1488. Conviction exposes the accused to the maximum allowable term, and jury trial is not constitutionally required for imposition of sentence within that range (Willaims v. New York, 1949, 69 S. Ct. 1079); but the "full panoply of due process protections" apply in cases where the sentencing judge exceeds the ordinary maximum, pursuant to an enhanced sentencing scheme calling for satisfaction of distinct (that is, wholly unrelated to the crime) prerequisite elements. Estelle v. Smith, 1981, 101 S. Ct. 1866; Specht v. Patterson, 1967, 87 S. Ct. 1209; and U.S. ex rel. Gerchman v. Maroney, CA3 1967, 355 F. 2d 302.

Conclusion. Accordingly, this Court is asked to reverse the extended aspect of petitioner's sentence, and remand for jury trial on the issue of whether petitioner qualifies for an enhanced term.

Service. Under penalty of perjury, I certify that on this day, by mailing First Class postage prepaid via the U.S. Mail, I served two copies of this instrument upon each: ATTORNEY GENERAL OF NEW JERSEY (Princeton); and the PUBLIC DEFENDER OF NEW JERSEY (East Orange). N. J. Ct. R. 1:4-4(b).

Sincerely yours,

David Bové

DAVID BOVE, pro se
Defendant-Petitioner

* All extended terms increase the exposure by more than 6 months. NJS 2C:43-7.

SUPREME COURT OF NEW JERSEY
C-655 September Term 1981

STATE OF NEW JERSEY,

Plaintiff-Respondent,

vs.

DAVID BOVE,

Defendant-Petitioner.

19,684

O R D E R

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-2891-80T4 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied; and it is further

ORDERED that the appeal in the within matter is dismissed pursuant to R. 2:12-9.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 26th day of May, 1982.

FILED
SUPREME COURT
MAY 28 1982

Clerk

TRUE COPY
Stephen Wilentz
CLERK

David Bove (Aplt-ptr. pro se)
#65985, N. J. State Prison
Lock Bag R
Rahway, New Jersey 07065

Filed in the U. S. Supreme Court
on or about July 16th, 1982.

In The United States Supreme Court
October Term, 1981

THE STATE OF NEW JERSEY,
Appellee/Respondent,
vs.
DAVID BOVE a/k/a Edward Rosenberg,
Appellant/Petitioner.

DOCKET NO. _____

CRIMINAL ACTION

NOTICE OF APPEAL

TO: Clerk of the U. S. Supreme Court
Attorney General of New Jersey
Esquire for Appellee/Respondent
Supreme Court of New Jersey

PLEASE TAKE NOTICE that the Appellant/Petitioner, David Bove, who is presently confined serving an enhanced sentence of 5 to 10 years for theft, will appeal from the final judgment of the New Jersey Supreme Court, decided on May 26th, 1982, under case number 19,684 (or C-655). This appeal is launched pursuant to 28 USC 1257(2).

David Bove

DAVID BOVE
a/k/a Edward Rosenberg
Appellant/Petitioner

DATED: July 14th, 1982

CWV

ORIGINAL

RECEIVED
NOV 22 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

No. 82-5074

DAVID BOVE, Appellant,

v.

THE STATE OF NEW JERSEY, Appellee.

On Appeal from the Supreme Court of New Jersey

MOTION TO DISMISS

The Appellee moves the Court to dismiss this appeal on the ground that no substantial question not previously decided by this Court has been raised.

IRWIN I. KIMMELMAN
ATTORNEY GENERAL OF NEW JERSEY
ATTORNEY FOR PLAINTIFF-RESPONDENT
STATE OF NEW JERSEY
RICHARD J. HUGHES JUSTICE COMPLEX
TRENTON, NEW JERSEY 08625

MARK PAUL CRONIN
DEPUTY ATTORNEY GENERAL
DIVISION OF CRIMINAL JUSTICE
APPELLATE SECTION
P. O. BOX CN 086
TRENTON, NEW JERSEY 08625
(609) 984-2009

OF COUNSEL AND ON THE MOTION

10

I.

THE STATE STATUTES INVOLVED AND THE NATURE OF THE CASE.

Appellant claims that he was entitled to a jury trial on the question whether he was eligible for the imposition of an extended term of imprisonment as a persistent offender. Appellant was convicted of a crime of the third degree and a crime of the fourth degree. Under New Jersey law, the sentence for a third degree crime is between three and five years. However, a persistent offender, defined as a person with at least two adult convictions within the last ten years, is eligible to receive a sentence of up to ten years. Additionally, the court may fix a period of parole ineligibility. The statutes at issue are set forth below.

N.J. Stat. Ann. sec. 2C:43-6 provides:

> a. Except as otherwise provided, a person who has been convicted of a crime may be sentenced to imprisonment, as follows:
>
> * * *
>
> (3) In the case of a crime of the third degree, for a specific term of years which shall be fixed by the court and shall be between 3 years and 5 years;
>
> * * *
>
> b. As part of a sentence for any crime where the court is clearly convinced that the aggravating factors substantially outweigh the mitigating factors, as set forth in subsection a. and b. of 2C:44-1, the court may fix a minimum term not to exceed one-half of the term set pursuant to subsection a., or one-half of the term as set pursuant to a maximum period of incarceration for a crime set forth in any statute other than this code, during which the defendant shall not be eligible for parole provided that no defendant shall be eligible for parole at a date earlier than otherwise provided by the law governing parole.

N.J. Stat. Ann. sec. 2C:43-7 provides for the imposition of the extended term as follows:

> a. In the cases designated in section 2C:44-3 or 2C:11-3, a person who has been convicted of a crime may be sentenced to an

extended term of imprisonment, as follows:

> (4) In the case of a crime of the third degree, for a term which shall be fixed by the court between 5 and 10 years;
>
> * * *
>
> b. As part of a sentence for an extended term and notwithstanding the provisions of 2C:43-9, the court may fix a minimum term not to exceed one-half of the term set pursuant to subsection a. during which the defendant shall not be eligible for parole or a term of 25 years during which time the defendant shall not be eligible for parole where the sentence imposed was life imprisonment provided that no defendant shall be eligible for parole at a date earlier than otherwise provided by the law governing parole.

N.J. Stat. Ann. sec. 2C:44-3 provides the criteria for imposing an extended term:

> The court may, upon application of the prosecuting attorney, sentence a person who has been convicted of a crime of the first, second or third degree to an extended term of imprisonment if it finds one or more of the grounds specified in this section. If the grounds specified in subsection d. are found, and the person is being sentenced for commission of any of the offenses enumerated in 2C:43-6c., the court shall sentence the defendant to an extended term as required by 2C:43-6c., and application by the prosecutor shall not be required. The finding of the court shall be incorporated in the record.
>
> a. The defendant is a persistent offender. A persistent offender is a person who at the time of the commission of the crime is 21 years of age or over, who has been previously convicted on at least two separate occasions of two crimes, committed at different times, when he was a least 18 years of age, if the latest in time of these crimes or the date of the defendant's last release from confinement, whichever is later, is within 10 years of the date of the crime for which the defendant is being sentenced.
>
> * * *

The procedure to be followed in imposing an extended term is set forth in N.J.Ct.R. 3:21-4(d):

> A motion pursuant to N.J.S.A. 2C:44-3 for the imposition of an extended term of imprisonment shall be filed with the court by the prosecuting attorney within 14 days of the entry of defendant's guilty plea or of the return of the verdict and a copy of the motion shall be served on defendant. For

good cause shown the court may extend the time for filing the motion. The sentence shall include a determination as to whether the defendant was convicted and sentenced to an extended term of imprisonment as provided in N.J.S.A. 2C:43-7, 2C:44-3 and 2C:44-6e, and the commitment or order of sentence which directs the defendant's confinement shall so specify.

II.

THE PROCEEDINGS BELOW.

On December 24, 1980, appellant was charged in Monmouth County Accusation No. 548-80 with theft, in violation of N.J. Stat. Ann. sec. 2C:20-3, a third-degree offense (count one) and with possession of a weapon (a knife), in violation of N.J. Stat.Ann. sec. 2C:39-5(d), a fourth-degree offense (count two).

On December 24, 1980, appellant appeared before the Honorable Donald J. Cunningham, J.S.C., waived indictment, and entered a retraxit plea of guilty to the two counts in the accusation. In return for this negotiated plea, the State agreed to make no recommendation as to sentence and that any sentences imposed on the two counts would run concurrently.

On February 27, 1981, appellant appeared before Judge Cunningham for sentencing. The State had discovered in the meantime that appellant was not Edward Rosenberg, as he had represented at the time of the plea, but David Bove, and that David Bove had a long criminal record, including two robbery convictions. Before sentencing, an amended bargain was negotiated whereby the plea would not be rescinded but the State would move for appellant to be sentenced to an extended term under the provisions of N.J. Stat. Ann. sec. 2C:43-7, N.J. Stat. Ann. sec. 2C:44-3, and N.J. Stat. Ann. sec. 2C:44-6. After hearing the defense, Judge Cunningham granted the motion. He sentenced appellant to ten years in New Jersey State Prison for theft and to a concurrent term of 18 months for possession of a knife and fixed a term of five years during which appellant would be ineligible for parole.

On March 24, 1981, appellant filed a Notice of Appeal to the Superior Court of New Jersey, Appellate Division. That court affirmed the conviction on February 23, 1982.

Appellant filed a notice of petition for certification to the New Jersey Supreme Court on March 17, 1982. A Notice of Appeal was filed on March 22, 1982. On May 26, 1982, the Supreme Court denied certification and dismissed the appeal. State v. Bove, 91 N.J. 216, 450 A. 2d 544 (1982). Appellant thereafter filed a notice of appeal to this Court, invoking the Court's jurisdiction pursuant to 28 U.S.C. sec. 1257(2).

III

STATEMENT OF THE CASE.

When appellant appeared before Judge Donald J. Cunningham in Monmouth County Superior Court on December 24, 1980, and entered retraxit pleas of guilty to an accusation of theft and possession of a weapon, he represented that his name was Edward Rosenberg, that he had been born and raised in Brooklyn, and that he had no prior record except for juvenile offenses. (Pa4; Pa7-8). Appellant admitted having entered a supermarket in Ocean Township on November 20, 1980, while intoxicated, intending to steal meat. He went to the check-out counter instead, ostensibly to buy a pack of gum. When the cashier opened the cash register to make change, appellant reached in, grabbed money and food stamps, and ran. He was tackled and arrested on the spot. (9a5-6). Defendant was carrying a knife with an eight-inch blade in his waistband. (PSR2).* All money and food stamps, a total of $654, was recovered. (PSR2A).

In return for appellant's guilty pleas and on the understanding that appellant had no prior adult record, the State promised to make no recommendation as to length of

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* "PSR" refers to the presentence report prepared in connection with appellant's sentencing.

sentence, to recommend that any sentences imposed run concurrently, and to move for dismissal of the municipal court complaint against appellant. (Pa4). Judge Cunningham expressly made no promise about the sentences he would impose. (Pa8). He ascertained that appellant understood the maximum penalty for theft was five years and for possession of a knife was 18 months. (Pa7).

During negotiations for the plea bargain and at the hearing on the plea, appellant was represented by counsel. Judge Cunningham ascertained that appellant was satisfied with his counsel, that appellant's plea was entered voluntarily, in full understanding of the charges against him and of the consequences of the plea, and that appellant was in fact guilty. (Pa8; Pa6-7).

Appellant returned for sentencing on February 27, 1981. In the interim, the State had ascertained appellant's true identity by its own investigation. Throughout his presentence investigation, appellant had insisted that he was Edward Rosenberg, with no prior record except juvenile offenses. Only at sentencing did appellant admit his true identity as David Bove, who was born and raised not in Brooklyn but locally, in Belmar, and whose prior record, including juvenile offenses, comprised eight arrests and six convictions, including two robbery convictions. (PSR1; PSR3 to PSR8; Pa21). At the time of his arrest on the present offense, appellant was on parole, transferred from New York on a robbery conviction. (PSR3).

After having ascertained appellant's true status, the State wished to rescind the plea bargain. However, appellant and the State negotiated a compromise by which the plea would be amended to allow the State to move for imposition of an extended term. (Pa15; Pa26). In return, appellant would still retain the benefit of the State's recommendation of concurrent

sentences on the two counts. The terms of the amended bargain were presented on the record to appellant at sentencing, and defense counsel reported that appellant did not object to the State's motion but requested that the court in its discretion deny the motion. (Pa17).* When the court addressed appellant, he agreed with his counsel's representations. (Pa10).

On the strength of these developments, the State moved for an extended term, a motion which defense counsel explicitly conceded to be unobjectionable. (Pa17; Pa21). After hearing the defense on the court's discretion to impose an extended term and a period of ineligibility for parole, Judge Cunningham granted the State's motion. (Pa20; Pa26). He sentenced defendant to concurrent terms of ten years and of 18 months in New Jersey State Prison and fixed a period of five years during which defendant would be ineligible for parole. (Pa26-27).

IV.

THE CASE PRESENTS NO SUBSTANTIAL QUESTION NOT PREVIOUSLY DECIDED BY THIS COURT AND, THUS, SHOULD BE DISMISSED.

A. Appellant Is Attempting To Raise An Issue Not Properly Presented To The State Courts.

Appellant contends that he is entitled to a jury trial on the question whether he is a persistent offender, as that term is defined in the New Jersey statute. N.J. Stat. Ann. sec. 2C:44-3(a) provides for a longer term of imprisonment if a person who is to be sentenced has been convicted of crimes on two prior occasions. Defendant was represented by appointed counsel designated by the Office of the Public Defender on appeal to the Superior Court of New Jersey, Appellate Division, and on petition for certification to the New Jersey Supreme

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* The court informed appellant that under the State's motion, the maximum sentence would be increased from five to ten years and that a minimum term of five years before parole eligibility could be imposed. (Pa18).

Court. Counsel filed a brief on behalf of appellant in the Appellate Division and a petition and supplemental petition in the Supreme Court. In none of these pleadings was it alleged that appellant's right to trial by jury had been violated. This claim first appeared in an appendix to a pro se supplemental letter which appellant sent to the Appellate Division some six months after the State of New Jersey had filed its responding brief in that court. Appellant also raised the claim in a pro se letter to the New Jersey Supreme Court forwarded after the filing of his petition for certification.

It is clear that the United States Supreme Court limits its consideration of cases brought before it by petition for certiorari or appeal to questions which properly arise in the record, Tyrell v. District of Columbia, 243 U.S. 1 (1917), and which were urged and briefed below. Jenkins v. Anderson, 447 U.S. 231, 233 n.1 (1980); United States v. Santana, 427 U.S. 38, 41 n.2 (1976); Dorszynski v. United States, 418 U.S. 424, 431 n.7 (1974); Ramsey v. United Mine Workers, 401 U.S. 302, 312 (1970); Neely v. Ebry Construction Co., 386 U.S. 317, 330 (1967); Lawn v. United States, 355 U.S. 339 (1957); California v. Taylor, 353 U.S. 553, 557 n.21 (1954). Only in exceptional cases will this Court review issues not raised and briefed below. Youakim v. Miller, 425 U.S. 231 (1976); Vachon v. New Hampshire, 414 U.S. 478 (1974); Duignarn v. United States, 247 U.S. 195 (1926). For example, this Court has included issues which were not raised and briefed in lower courts in its policy to refrain from adjudicating constitutional claims whenever possible, see, e.g., Vachon v. New Hampshire, supra, at 479 n.3; Fry v. United States, 421 U.S. 542, 545 (1975), or where an indigent petitioner, who was not represented by counsel in his state court, appeals and raises new issues on certiorari. See e.g., Ballard v. United States, 352 U.S. 354, 359 (1956). Cf. Monks v. New Jersey, 398 U.S. 71 (1970).

The State submits that appellant's claim does not present any exceptional situation warranting consideration by this Court of these issues raised for the first time. Appellant was represented by competent counsel, who declined to litigate the jury issue at trial, in the Appellate Division, or even in the New Jersey Supreme Court after appellant submitted his first pro se letter. There is no procedure whereby the pro se letters could have been filed by the appellate courts. New Jersey court rules permit the filing of an appellant's brief, a responding brief and, within 10 days, a reply brief. No other briefs may be filed without leave of court. N.J.Ct.R. 2:6-11. No such leave was sought in this case. Moreover, the pro se letter could not be deemed a reply brief, apart from its untimeliness, because New Jersey practice does not allow the filing of a reply brief which adds issues not theretofore raised. State v. Smith, 55 N.J. 476, 488, 262 A.2d 868, 874 (1970). For these reasons, the State has never briefed the issue now raised by appellant in this Court.

Further, examination of the opinion of the Appellate Division reveals that it did not consider the issue. That court listed the issues raised by appellant as "...(1) the sentence violated the plea agreement; (2) the sentence should be reduced based on N.J.S.A. 2C:44-7 [which merely confers the power to review sentences on the appellate courts]; and (3) he was not informed that an extended term or parole ineligibility could be imposed." (Pa49-50). The opinion indicates that it considered the arguments advanced by appellant, "... including the pro se letter brief. ..." But it must be noted that the pro se letter does not, itself, contain any legal argument. Rather, appellant complains to the court that he had asked his lawyer to raise various points but that the attorney did not. (Pa31). Appended to the letter was a lengthy research memorandum, which included a discussion of the right to jury trial when an extended term is

imposed. (Pa33-44).* Thus, it is clear that the supplemental letter itself included no legal argument and that the Appellate Division never considered appellant's belated claim.

Similarly, appellant's supplemental letter to the New Jersey Supreme Court could not have been filed or considered by the court. N.J.Ct.R. 2:12-3 provides for the filing of a notice of petition for certification; N.J.Ct.R. 2:12-7 describes the petition itself. There is no other provision for the filing of supplemental documents. The record on petition for certification consists only of the briefs, appendices and transcripts filed in the Appellate Division and the opinion of the Appellate Division. N.J. Ct.R. 2:12-6. Further, the New Jersey Supreme Court will not consider issues raised for the first time in that court. Farley v. $168,400.97, 55 N.J. 31, 46, 259 A.2d 201, 209 (1969).

From the foregoing discussion it is manifest that the claim that appellant was entitled to a jury trial was not raised in the state trial court, Appellate Division or Supreme Court. It has never been addressed by the State nor by the courts of New Jersey. We urge, therefore, that this Court dismiss the appeal and decline to consider the issue as a matter of initial impression.

B. There Is No Due Procees Right To Jury Trial Of A Motion To Impose An Extended Term.

Should this Court determine to review the merits of appellant's claim notwithstanding his failure to properly present it to the state courts, the State of New Jersey submits that the appeal should be dismissed for want of a substantial

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* Appellant does not include the entire appendix to the letter in his appendix to the brief filed in this Count. The first page of the appendix to the letter concerning jury trial is, however, marked "Dall," clearly indicating that it is not the first page in the original. Appellant deleted several pages of largely irrelevant case notes on unrelated topics, as well as the cover letter to his attorney which accompanied the notes.

federal question. Appellant contends that he is entitled to have a jury determine whether he is a persistent offender. The State submits that New Jersey has afforded appellant all of the procedural safeguards to which he is entitled, and that he has no right to jury trial at a sentencing proceeding.

Due process "is flexible and calls for such procedural protections as the particular situation demands." Morrissey v. Brewer, 408 U.S. 471, 481 (1972). In the context of sentencing, this Court held in Williams v. New York, 337 U.S. 241, 251 (1949):

> The due-process clause should not be treated as a device for freezing the evidential procedure of sentencing in the mold of trial procedure. So to treat the due-process clause would hinder if not preclude all courts - state and federal - from making progressive efforts to improve the administration of criminal justice.

Subsequently, this Court has defined the due process requirements in habitual offender proceedings, those cases where the convicted defendant is exposed to an increased term beyond the normal maximum sentence for that crime due to his prior record. Thus, it has been held that the defendant is entitled to be represented by retained counsel, Chandler v. Fretag, 348 U.S. 3 (1954), or court-appointed counsel, Chewning v. Cunningham, 368 U.S. 443 (1962), and to notice of that which the prosecution alleges qualifies the defendant for the increased penalty. Oyler v. Boles, 368 U.S. 448 (1962).

Some five years after the decisions in Chewning and Oyler, this Court considered what procedural safeguards were due a Colorado defendant who was convicted of a sexual offense. The maximum penalty for the crime was 10 years but the defendant could be sentenced to an indeterminate term of from one day to life, based upon certain factual determinations. The Sex Offenders Act was invoked without notice and full hearing. Specht v. Patterson, 386 U.S. 605, 607 (1967). This Court reaffirmed the holding of Williams v. New York, supra, but

declined to extend it to the Colorado scheme because that statute

> does not make the commission of a specified crime the basis for sentencing. It makes one conviction the basis for commencing another proceeding under another Act to determine whether a person constitutes a threat of bodily harm to the public, or is an habitual offender and mentally ill. That is a new finding of fact ... that was not an ingredient of the offense charged. [386 U.S. at 608].

Because this Court found that invocation of the Colorado Sex Offenders Act meant the "making of a new charge leading to criminal punishment," procedural due process was found to be required.

But Specht does not require the grafting of all due process rights afforded a defendant in a criminal trial onto the sentencing process. This is made clear in this Court's later decisions concerning the Florida capital punishment statute. That statute allows a jury to render an advisory verdict on the death penalty, but the trial judge ultimately imposes sentence. In Gardner v. Florida, 450 U.S. 349, 358 (1977), Justice Stevens wrote, "... it is not clear that the sentencing process ... must satisfy the requirements of the Due Process Clause." But, the Court elaborated:

> The fact that due process applies does not, of course, implicate the entire panoply of criminal trial procedural rights.
>
> "Once it is determined that due process applies, the question remains what process is due. It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands .... Its flexibility is in its scope once it has been determined that some process is due; it is a recognition that not all situations calling for procedural safeguards call for the same kind of procedure." Morrisey v. Brewer, 408 U.S. 471, 481 .... [430 U.S. at 358, n.9].

In Proffit v. Florida, 428 U.S. 242, 252-253 (1976), Justice Powell wrote:

> This Court has pointed out that jury sentencing in a capital case can perform an important societal function, ... but it has

> never suggested that jury sentencing is constitutionally required. And it would appear that judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases.

It is thus seen that this Court has never held that a defendant has a right to jury trial in the application of a recidivist statute. In fact, in the analogous area of capital sentencing, where certain specific aggravating factors must be found to exist, this Court has held that there is no right to jury trial.

The precise scope of the rights which must be afforded to a defendant was defined in this language from Specht v. Patterson:

> Due process, in other words, requires that he be present with counsel, have an opportunity to be heard, be confronted with witnesses against him, have the right to cross-examine, and to offer evidence of his own. And there must be findings adequate to make meaningful any appeal that is allowed. [386 U.S. at 610].

Those rights prescribed in Specht are afforded every criminal defendant in New Jersey. In particular, the prosecutor must give notice that an extended term is being sought by making a motion. N.J. Stat. Ann. sec. 2C:44-3. This motion must be made within 14 days of the guilty verdict or the defendant's guilty plea. N.J.Ct.R. 3:21-4(d). It is mandatory that the probation department prepare a presentence report and that the report be furnished to the defendant. N.J.Ct.R. 3:21-2(a). Before sentence is imposed, the court must address the defendant personally and give him the opportunity to speak, either personally or through his attorney, and present any information in mitigation of punishment. N.J.Ct.R. 3:21-4(b). The court is required to indicate whether an extended term is being imposed, N.J.Ct.R. 3:21-4(d), and to state its reasons for imposing

sentence. N.J.Ct.R. 3:21-4(e).

All of the procedures were followed in this case, and appellant does not contend otherwise. These procedures assure that appellant received a fair hearing at which he could effectively contest the applicability of the extended term provisions of N.J. Stat. Ann. sec 2C:44-3. The Fourteenth Amendment requires no more.

C. Appellant Waived Any Right To Jury Trial He May Have Had.

Even if appellant had presented his claim of error to the state courts and even if there is a right to jury trial on a motion to impose an extended term, it is the position of the State of New Jersey that appellant waived his right to jury trial by admitting, in court, that he was eligible for an extended term. At the sentencing hearing, defense counsel stated the following with respect to the motion to impose an extended term:

> Your Honor, at this time the defendant does not object to the application of the Prosecutor's Office both as to the time in which the application is being made in light of the circumstances of this case, and in the substance of the application; although we do wish to be heard on the Court's discretion in imposing an extended term as well as the Court's discretion in setting a minimum parole date under the new Code. [Pal7].
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> * * *
>
> What I'm saying, we do not object to an extended term being imposed on the Prosecutor's motion, but Your Honor under the Statute, it's not mandatory upon the Prosecutor's motion. [Pal8].
>
> * * *
>
> So at this point we're talking about a five to ten year term with a presumptive under the Code of seven years and with the exposure that should Your Honor so decide, as opposed to a seven year presumptive and let the chips fall where they may in terms of the classification and corrections, for Your Honor to impose a minimum parole date, we would strongly object to; but that would be heard in the normal course of sentencing. [Pal9].

Counsel also conceded appellant's prior record (Pa21), as well as the fact that appellant lied about his identity to avoid imprisonment. (Pa20-21).

In Oyler v. Boles, 368 U.S. 448 (1962), this Court considered the constitutionality of a West Virginia statute that imposed increased penalties upon recidivists. It was held that a defendant must receive reasonable notice and an opportunity to be heard relative to the recidivist charge. 318 U.S. at 452. In considering the applicability of that holding to the criminal defendants in that case, however, this Court held:

> But the petitioners, who were represented by counsel, neither denied they were the persons named nor remained silent. Nor did they object or seek a continuance on the ground that they had not received adequate notice and needed more time to determine how to respond with respect to the issue of identity. Rather, both petitioners rendered further inquiry along this line unnecessary by their acknowledgments in open court that they were the same persons who had previously been convicted. In such circumstances the petitioners are in no position now to assert that they were not given a fair opportunity to respond to the allegations as to their identity. [368 U.S. at 453].

It is submitted that the present case is undistinguishable from Oyler v. Boles, supra. In both cases, the defendants admitted their prior records and eligibility for sentencing under state statutes providing enhanced penalties for repeat offenders. Just as that stipulation rendered any defect in the notice given inconsequential in Oyler, it renders nugatory appellant's belated claim in this case that he was entitled to a jury trial. Hence, this appeal should be dismissed for failure to present a substantial federal question.

V.

CONCLUSION

Appellee respectfully submits that the question upon which this cause depends is so insubstantial as not to need further argument, and appellee therefore moves the Court to dismiss the appeal. Regarding this appeal as improvidently taken and treating appellant's jurisdictional statement as a petition for writ of certiorari, 28 U.S.C. sec. 2103, it is respectfully submitted that certiorari should be denied for the reasons stated herein.

Respectfully submitted,

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APPELLATE SECTION

OF COUNSEL AND ON THE MOTION

DATED: November 8, 1982